



## Office of the Secretary

### 43 CFR Part 11

[Docket No. DOI– DOI-2022-0016; 23XD1618EN, DS61600000,  
DMNHQ0000.000000]

**RIN 1090-AB26**

### Natural Resource Damages for Hazardous Substances

**AGENCY:** Office of Restoration and Damage Assessment, Interior.

**ACTION:** Advance notice of proposed rulemaking; request for public comment.

**SUMMARY:** The Office of Restoration and Damage Assessment (ORDA) is seeking comments and suggestions from state, tribal, and federal natural resource co-trustees, other affected parties, and the interested public on revising the simplified Type A procedures in the regulations for conducting natural resource damage assessments and restoration (NRDAR) for hazardous substance releases.

**DATES:** We will accept comments through [INSERT DATE 60 DAYS AFTER  
DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]

**ADDRESSES:** You may submit comments to ORDA on this advance notice of proposed rulemaking (ANPRM); request for public comment by any of the following methods. Please reference the Regulation Identifier Number (RIN) 1090-AB26 in your comments.

- Electronically: Go to <https://www.regulations.gov>. In the “Search” box enter “DOI-2022-0016.” Follow the instructions to submit public comments. We will post all comments.
- Hand deliver or mail comments to the Office of Restoration and Damage Assessment, U.S. Department of the Interior, 1849 C Street Northwest, Mail Stop/Room 2627, Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Emily Joseph, Director, Office of Restoration and Damage Assessment at (202) 208-4438 or email to [emily\\_joseph@ios.doi.gov](mailto:emily_joseph@ios.doi.gov).

**SUPPLEMENTARY INFORMATION:** We are proposing to revise the simplified (Type A) procedures for assessment of natural resource damages resulting from releases of hazardous substances. The Department of the Interior has previously developed two types of natural resource damage assessment regulations: Standard procedures for simplified assessments requiring minimal field observations (Type A Rule); and site-specific procedures for detailed assessments in individual cases (Type B Rule).

The Type B Rule was last revised in 2008 to emphasize natural resource restoration over economic damages, resolve a timing inconsistency, and respond to two previous Court decisions addressing the regulations: *State of Ohio v. U.S. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989); and *Kennecott Utah Copper Corp. v. U.S. Department of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996).

The Type A Rule was last revised in November 1997. It provides two distinct formulas for modeling damages for natural resource injuries caused by hazardous substance releases to coastal and marine environments and Great Lakes environments, respectively. In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA) 42 U.S.C. 9601 *et seq.*, damages calculated in accordance with Type A or Type B procedures are entitled to a “rebuttable presumption” of correctness in any administrative or judicial proceeding. The rebuttable presumption for the Type A procedure under the current version of the rule is limited to damages of \$100,000 or less.

## **Background**

Since its promulgation, the Type A Rule has rarely been utilized to resolve CERCLA Natural Resource Damage Assessment and Restoration (NRDAR) claims.

This may be partly due to the Type A Rule's restrictive scope—to two specific aquatic environments when relatively low-impact, single substance spills occur. Additionally, the model equation for each Type A environment is the functional part of the rule itself—with no provisions to reflect evolving toxicology, ecology, technology, or other scientific understanding without a formal amendment to the Type A Rule each time a parameter is modified. The result is an inefficient and inflexible rule that is not currently useful as a means to resolve NRDAR claims and promote natural resource restoration. For these reasons, the Department is now seeking to modernize the Type A process and develop a more flexible and enduring rule than what is provided by the two existing static models.

The Department is proposing to re-formulate the Type A Rule as a procedural structure for negotiated settlements by utilizing tools tailored to incidents of smaller scale and scope. We believe that this aligns better with the original statutory purpose of providing a streamlined and simplified assessment process as a companion to the more complex Type B Rule—to reduce transaction costs and expedite restoration in a broader range of less complex and contentious cases. Our objective is to essentially formalize beneficial practices that have evolved since the 1997 promulgation of the Type A Rule. Specifically, Trustees have utilized well-established methodologies such as habitat equivalency analysis (HEA), resource equivalency analysis (REA), and other relatively simple models to assess natural resource injury in smaller incidents that do not necessarily warrant the more prescriptive Type B procedures.

Pursuing a case under the new Type A would be initiated by the Trustees involved in the case. The new Type A Rule would be intended for use when the potentially responsible parties (PRPs) and all trustees with jurisdiction over the injured natural resources agree that the simplified procedures of the rule provide an appropriate means of assessing and resolving the claim. An assessment of damages performed

cooperatively in this manner would be entitled to a rebuttable presumption of correctness when undergoing administrative or judicial review.

However, rather than limiting the rule's applicability to a narrow range of cases and a pre-determined, static model, the Department of the Interior (Department) proposes to consider ways to expand the rule's scope through a structured process that will utilize a range of methods that have become widely used and accepted since the original rule was formulated, including existing habitat and resource equivalency analyses, and benefits transfers from similar cases. These methodologies are referenced in the current version of the CERCLA NRDAR rule (*See* 43 CFR 11.83) and have proven adaptable and functional enough to support negotiated resolution of a wide range of NRDAR claims that have withstood public and judicial scrutiny over the past two decades. We are seeking additional public input on what specific methodologies or procedures could be utilized under a revised Type A Rule.

In recognition of the evidentiary constraints of models when compared to more robust site-specific observation and information, the current Type A Rule limits the amount of damages that could be eligible for the Type A rebuttable presumption to \$100,000 or less. We recognize that \$100,000—un-adjusted for more than 25 years of inflation from 1997—likely represents an extremely narrow range of present day NRDAR claims. More importantly, it would be challenging for NRDAR trustees and PRPs to engage in even a streamlined cooperative process that is cost-effective in the context of \$100,000 in total damages. Accordingly, we are seeking public input on the appropriate amount of damages eligible for a rebuttable presumption when utilizing a new Type A process.

We are also seeking public input on potential non-monetary limitations for using the Type A Rule—including whether the Type A Rule can be utilized at a site with multiple PRPs, and whether PRPs voluntarily participating in a Type A process need to

agree to pay the reasonable cost of that process. Additionally, we are seeking public input on whether the revised Type A should include reasonable assessment costs within the cap applicable for the Type A Rule, and whether there should be a time limit—accompanied by a tolling agreement—to how long a Type A process could take. Finally, we are seeking public input as to whether the Type A claim should continue to be eligible to be combined with a Type B assessment or with other Type A processes at the same site—which could result in applying the Type A Rule to only certain discrete natural resource categories at a site.

The Department anticipates that NRDAR claims resolved through the revised Type A Rule will be subject to a 30-day public notice and review process before finalization. As part of this public notice and review, NRDAR trustees would make available the application of the model they relied on (including the data inputs) and any relevant supporting information. As with the current rule, Trustees would consider, and when appropriate, respond to any public comments. Any changes to the voluntary agreement as a result of public comment would also be approved by the settling PRPs in order to finally resolve the claim.

Consistent with CERCLA section 111(i) (42 U.S.C. 9611(i)), Trustees would continue to expend damages recovered under the Type A Rule pursuant to a Restoration Plan. Trustees would also continue to have the ability to select appropriate restoration projects without being restricted to selecting the general restoration methods used by the Type A equivalency model they employ to calculate their NRDAR claim. Trustees would maintain the discretion to spend recovered sums on other actions to restore, replace, or acquire the equivalent of injured resources or services.

### **Description of Information Requested**

This advance notice of proposed rulemaking seeks comments on the questions posed above to re-formulate the Type A Rule, including: (1) which assessment

methodologies would be appropriate for use in simplified assessments under a revised Type A rule , (2) the amount of damages eligible for a rebuttable presumption when utilizing a new Type A process, (3) whether to include reasonable costs of assessment within the total cap for application of the Type A Rule, (4) whether PRPs voluntarily participating in a Type A process need to agree to pay the reasonable cost of that process, (5) whether the Type A Rule is appropriate for a site with multiple PRPs, and (6) how long a Type A process could last. The Department would also appreciate comments that address interest in using revised Type A procedures, along with suggestions that improve the efficiency and cost effectiveness of the NRDAR Type A process.

### **Public Comment Procedures**

The Department is not obligated to consider comments that we receive after the close of the comment period for this ANPRM, or comments that are delivered to an address other than those listed in this notice. After the comment period for this ANPRM closes, the Department will review all comment submissions. Upon consideration, the Department may publish a notice of proposed rulemaking.

We are particularly interested in receiving comments and suggestions about the topics identified in the Description of Information Requested section. Written comments that are specific, explain the rationale for the comment or suggestion, address the issues outlined in this notice, and where possible, refer to specific statutes, existing regulations, case law, or NRDAR practices are most useful.

Before including your address, phone number, email address or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—might be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review we cannot guarantee that we will do so.

(Authority: 42 U.S.C. 9601, secs. 104, 107, 111(I), 122)

**Emily Joseph,**

*Director,*

*Office of Restoration and Damage Assessment.*

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